

RELEVANT STATUTES:
TITLE 18 U.S.C.

§ 641. Public money, property or records

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—

Shall be fined not more than \$10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of \$100, he shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater. June 25, 1948, c. 645, 62 Stat. 725.

For section 37I, see
p. 452 of the casebook.

§ 793. Gathering, transmitting or losing defense information.

(a) Whoever, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation, goes upon, enters, flies over, or otherwise obtains information concerning any vessel, aircraft, work of defense, navy yard, naval station, submarine base, fueling station, fort, battery, torpedo station, dockyard, canal, railroad, arsenal, camp, factory, mine, telegraph, telephone,

wireless, or signal station, building, office, research laboratory or station or other place connected with the national defense owned or constructed, or in progress of construction by the United States or under the control of the United States, or of any of its officers, departments, or agencies, or within the exclusive jurisdiction of the United States, or any place in which any vessel, aircraft, arms, munitions, or other materials or instruments for use in time of war are being made, prepared, repaired, stored, or are the subject of research or development, under any contract or agreement with the United States, or any department or agency thereof, or with any person on behalf of the United States, or otherwise on behalf of the United States, or any prohibited place so designated by the President by proclamation in time of war or in case of national emergency in which anything for the use of the Army, Navy, or Air Force is being prepared or constructed or stored, information as to which prohibited place the President has determined would be prejudicial to the national defense; or

(b) Whoever, for the purpose aforesaid, and with like intent or reason to believe, copies, takes, makes, or obtains, or attempts to copy, take, make, or obtain, any sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, document, writing, or note of anything connected with the national defense; or

(c) Whoever, for the purpose aforesaid, receives or obtains or agrees or attempts to receive or obtain from any person, or from any source whatever, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note, of anything connected with the national defense, knowing or having reason to believe, at the time he receives or obtains, or agrees or attempts to receive or obtain it, that it has been or will be obtained, taken, made, or disposed of by any person contrary to the provisions of this chapter; or

(d) Whoever, lawfully having possession of, access to, control over, or being entrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted or attempts to communicate, deliver, transmit or cause to be communicated, delivered or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it; or

(e) Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United

States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it; or

(f) Whoever, being entrusted with or having lawful possession or control of any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, note, or information, relating to the national defense, (1) through gross negligence permits the same to be removed from its proper place of custody or delivered to anyone in violation of his trust, or to be lost, stolen, abstracted, or destroyed, or (2) having knowledge that the same has been illegally removed from its proper place of custody or delivered to anyone in violation of its trust, or lost, or stolen, abstracted, or destroyed, and fails to make prompt report of such loss, theft, abstraction, or destruction to his superior officer—

Shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

(g) If two or more persons conspire to violate any of the foregoing provisions of this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of such conspiracy. (June 25, 1948, ch. 645, 62 Stat. 736; Sept. 23, 1950, ch. 1024, title I, § 18, 64 Stat. 1003.)

LEGISLATIVE HISTORY

Reviser's Note.—Based on sections 31 and 36 of title 50, U. S. C., 1940 ed., War and National Defense (June 15, 1917, ch. 30, title I, §§ 1, 6, 40 Stat. 217, 219; Mar. 28, 1940, ch. 72, § 1, 54 Stat. 79).

Section consolidated sections 31 and 36 of title 50, U. S. C., 1940 ed., War and National Defense.

Words "departments or agencies" were inserted twice in conformity with definitive section 6 of this title to eliminate any possible ambiguity as to scope of section.

The words "or induces or aids another" were omitted wherever occurring as unnecessary in view of definition of "principal" in section 2 of this title.

Mandatory punishment provision was rephrased in the alternative.

Minor changes were made in phraseology.

AMENDMENTS

1950—Act Sept. 23, 1950, divided section into subdivisions, added laboratories and stations, and places where material or instruments for use in time of war are the subject of research or development to the list of facilities and places to which subsection (a) applies, made subsection (d) applicable only in cases in which possession, access, or control is lawful, added subsection (e) to take care of cases in which possession, access, or control, is unlawful, made subsection (f) applicable to instruments and appliances, as well as to documents, records, etc., and provided by subsection (g) a separate penalty for conspiracy to violate any provisions of this section.

INDICTMENT FOR VIOLATING THIS SECTION; LIMITATION PERIOD

Limitation period in connection with indictments for violating this section, see note under section 792 of this title.

CANAL ZONE

Applicability of section to Canal Zone, see section 14 of this title.

CROSS REFERENCES

Activities affecting armed forces—

Generally, see section 2387 of this title.

During war, see section 2388 of this title.

Classified information, disclosure by Government official, or other person, penalty for, see section 783 (b), (d) of Title 50, War and National Defense and section 798 of this title.

Federal retirement benefits, forfeiture upon conviction of offenses described under this section, see section 8312 of Title 5, Government Organization and Employees.

Forfeiture of veterans' benefits upon conviction under this section, see section 3505 of Title 38, Veterans' Benefits. Jurisdiction of offenses, see section 3241 of this title.

Letters, writings, etc., in violation of this section as non-mailable, see section 1717 of this title.

Nonmailable letters and writings, see section 1717 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 14, 792, 1717 of this title; title 5 section 8312; title 8 section 1251; title 38 section 3505; title 50 sections 782, 795, 825.

§ 794. Gathering or delivering defense information to aid foreign government.

(a) Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by death or by imprisonment for any term of years or for life.

(b) Whoever, in time of war, with intent that the same shall be communicated to the enemy, collects, records, publishes, or communicates, or attempts to elicit any information with respect to the movement, numbers, description, condition, or disposition of any of the Armed Forces, ships, aircraft, or war materials of the United States, or with respect to the plans or conduct, or supposed plans or conduct of any naval or military operations, or with respect to any works or measures undertaken for or connected with, or intended for the fortification or defense of any place, or any other information relating to the public defense, which might be useful to the enemy, shall be punished by death or by imprisonment for any term of years or for life.

(c) If two or more persons conspire to violate this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of such conspiracy. (June 25, 1948, ch. 645, 62 Stat. 737; Sept. 3, 1954, ch. 1261, title II, § 201, 68 Stat. 1219.)

LEGISLATIVE HISTORY

Reviser's Note.—Based on sections 32 and 34 of title 50, U. S. C., 1940 ed., War and National Defense (June 15, 1917, ch. 30, title I, §§ 2, 4, 40 Stat. 218, 219).

Section consolidates sections 32 and 34 of title 50, U. S. C., 1940 ed., War and National Defense.

The words "or induces or aids another" were omitted as unnecessary in view of definition of "principal" in section 2 of this title.

§ 2514. Immunity of witnesses.

Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of this chapter or any of the offenses enumerated in section 2516, or any conspiracy to violate this chapter or any of the offenses enumerated in section 2516 is necessary to the public interest, such United States attorney, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. No such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except in a proceeding described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section. (Added Pub. L. 90-351, title III, § 802, June 19, 1968, 82 Stat. 216.)

REPEAL

Pub. L. 91-452, title II, §§ 227(a), 260, Oct. 15, 1970, 84 Stat. 930, 931, repealed this section effective four years following the sixtieth day after the date of the enactment of Pub. L. 91-452, which was approved Oct. 15, 1970, with such repeal not to affect any immunity to which any individual is entitled hereunder by reason before such day. See section 260 of Pub. L. 91-452, set out as a note under section 6001 of this title.

CROSS REFERENCES

Immunity of witnesses, see section 6001 et seq. of this title.

§ 2515. Prohibition of use as evidence of intercepted wire or oral communications.

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter. (Added Pub. L. 90-351, title III, § 802, June 19, 1968, 82 Stat. 216.)

For sections 2510, 2511, 2516 and 2518, see pp. 975 to 980 of the casebook.

For section 3146, see the Bail Reform Act on pp. 1113-1114 of the casebook..

§ 3147. Appeal from conditions of release.

(a) A person who is detained, or whose release on a condition requiring him to return to custody after specified hours is continued, after review of his application pursuant to section 3146(d) or section 3146(e) by a judicial officer, other than a judge of the court having original jurisdiction over the offense with which he is charged or a judge of a United States court of appeals or a Justice of the Supreme Court, may move the court having original jurisdiction over the offense with which he is charged to amend the order. Said motion shall be determined promptly.

(b) In any case in which a person is detained after (1) a court denies a motion under subsection (a) to amend an order imposing conditions of release, or (2) conditions of release have been imposed or amended by a judge of the court having original jurisdiction over the offense charged, an appeal may be taken to the court having appellate jurisdiction over such court. Any order so appealed shall be affirmed if it is supported by the proceedings below. If the order is not so supported, the court may remand the case for a further hearing, or may, with or without additional evidence, order the person released pursuant to section 3146(a). The appeal shall be determined promptly. (Added Pub. L. 89-465, § 3(a), June 22, 1966, 80 Stat. 215.)

§ 3148. Release in capital cases or after conviction.

A person (1) who is charged with an offense punishable by death, or (2) who has been convicted of an offense and is either awaiting sentence or sentence review under section 3576 of this title or has filed an appeal or a petition for a writ of certiorari, shall be treated in accordance with the provisions of section 3146 unless the court or judge has reason to believe that no one or more conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community. If such a risk of flight or danger is believed to exist, or if it appears that an appeal is frivolous or taken for delay, the person may be ordered detained. The provisions of section 3147 shall not apply to persons described in this section: *Provided*, That other rights to judicial review of conditions of release or orders of detention shall not be affected. (Added Pub. L. 89-465, § 3(a), June 22, 1966, 80 Stat. 215, and amended Pub. L. 91-452, title X, § 1002, Oct. 15, 1970, 84 Stat. 952.)

STATUTES

§ 3504. Litigation concerning sources of evidence.

(a) In any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States—

(1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act;

(2) disclosure of information for a determination if evidence is inadmissible because it is the primary product of an unlawful act occurring prior to June 19, 1967, or because it was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, shall not be required unless such information may be relevant to a pending claim of such inadmissibility; and

(3) no claim shall be considered that evidence of an event is inadmissible on the ground that such evidence was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, if such event occurred more than five years after such allegedly unlawful act.

(b) As used in this section "unlawful act" means any act the use of any electronic, mechanical, or other device (as defined in section 2510(5) of this title) in violation of the Constitution or laws of the United States or any regulation or standard promulgated pursuant thereto. (Added Pub. L. 91-452, title VII, § 702(a), Oct. 15, 1970, 84 Stat. 935.)

CONGRESSIONAL STATEMENT OF FINDINGS

Section 701 of Pub. L. 91-452 provided that: "The Congress finds that claims that evidence offered in proceedings was obtained by the exploitation of unlawful acts, and is therefore inadmissible in evidence, (1) often cannot reliably be determined when such claims concern evidence of events occurring years after the allegedly unlawful act, and (2) when the allegedly unlawful act has occurred more than five years prior to the event in question, there is virtually no likelihood that the evidence offered to prove the event has been obtained by the exploitation of that allegedly unlawful act."

APPLICABILITY TO PROCEEDINGS

Section 703 of Pub. L. 91-452 provided that: "This title [enacting this section and provisions set as notes under this section] shall apply to all proceedings, regardless of when commenced, occurring after the date of its enactment [Oct. 15, 1970]. Paragraph (3) of subsection (a) of section 3504, chapter 223, title 18, United States Code [subsec. (a)(3) of this section], shall not apply to any proceeding in which all information to be relied upon to establish inadmissibility was possessed by the party making such claim and adduced in such proceeding prior to such enactment."

§ 6002. Immunity generally.

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the

order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order. (Added Pub. L. 91-452, title II, § 201(a), Oct. 15, 1970, 84 Stat. 927.)

EFFECTIVE DATE

Section effective on the sixtieth day following Oct. 15, 1970, see section 200 of Pub. L. 91-452, set out as a note under section 6001 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 6003, 6004, 6005 of this title.

§ 6003. Court and grand jury proceedings.

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

(Added Pub. L. 91-452, title II, § 201(a), Oct. 15, 1970, 84 Stat. 927.)

FEDERAL RULES OF CRIMINAL PROCEDURE: RULE 40

RULE 40. COMMITMENT TO ANOTHER DISTRICT; REMOVAL

(a) Arrest in Nearby District.

If a person is arrested on a warrant issued upon a complaint in a district other than the district of the arrest but in the same state, or on a warrant issued upon a complaint in another state but at a place less than 100 miles from the place of arrest, or without a warrant for an offense committed in another district in the same state or in another state but at a place less than 100 miles from the place of the arrest, he shall be taken before the nearest available commissioner or other nearby officer described in Rule 5 (a); preliminary proceedings shall be conducted in accordance with Rule 5 (b) and (c); and if held to answer, he shall be held to answer to the district court for the district in which the prosecution is pending, or if the arrest was without a

regret to say that from this examination I fear that Judge Wilkey's statements have possible foundation. I therefore share his concern. I hope that damage already has not been done. If, however, damage has been done, and if, with the Court's action today, these newspapers proceed to publish the critical documents and there results therefrom "the death of soldiers, the destruction of alliances, the greatly increased difficulty of negotiation with our enemies, the inability of our diplomats to negotiate," to which list I might add the factors of prolongation of the war and of further delay in the freeing of United States prisoners, then the Nation's people will know where the responsibility for these sad consequences rests.

312 U.S. 19
GORIN v. UNITED STATES.
SALICH v. UNITED STATES.
 Nos. 87, 88.

Argued Dec. 19, 1940.
 Decided Jan. 13, 1941.

Rehearing Denied Feb. 10, 1941.

See 312 U.S. 713, 61 S.Ct. 617, 618,
 85 L.Ed. —.

Mr. Justice REED delivered the opinion of the Court.

This certiorari brings here a judgment of the Circuit Court of Appeals affirming the sentences of the two petitioners who were convicted of violation of the Espionage Act of June 15, 1917, 50 U.S.C.A. § 31 et seq., 9 Cir., 111 F.2d 712. As the affirmance turned upon a determination of the scope of the Act and its constitutionality as construed, the petition

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was allowed because of the questions, important in enforcing this criminal statute.

The joint indictment in three counts charged in the first count violation of sec-

tion 1(b) by allegations in the words of the statute of obtaining documents "connected with the national defense"; in the second count violation of section 2(a) in delivering and inducing the delivery of these documents to the petitioner, Gorin, the agent of a foreign nation; and in the third count of section 4 by conspiracy to deliver them to a foreign government and its agent, just named. The pertinent statutory provisions appear below.¹ A third party, the wife of Gorin, was joined in

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and acquitted on all three counts. The petitioners were

found guilty on each count and sentenced to various terms of imprisonment to run concurrently and fines of \$10,000 each. The longest term of Gorin is six years and of Salich four years.

The proof indicated that Gorin, a citizen of the Union of Soviet Socialist Republics, acted as its agent in gathering information. He sought and obtained from Salich for substantial pay the contents of over fifty reports relating chiefly to Japanese activities in the United States. These reports were in the files of the Naval Intelligence branch office at San Pedro, Cali-

¹ Espionage Act of June 15, 1917, c. 30, 40 Stat. 217:

"Title 1. Espionage. Section 1. That (a) whoever, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation, goes upon, enters, flies over, or otherwise obtains information concerning any vessel, aircraft, work of defense, navy yard, naval station, submarine base, coaling station, fort, battery, torpedo station, dockyard, canal, railroad, arsenal, camp, factory, mine, telegraph, telephone, wireless, or signal station, building, office, or other place connected with the national defense, * * * or any place in which any vessel, aircraft, arms, munitions, or other materials or instruments for use in time of war are being made, prepared, repaired, or stored * * *; or (b) whoever for the purpose aforesaid, and with like intent or reason to believe, copies, takes, makes, or obtains, or attempts, or induces or aids another to copy, take, make, or obtain, any sketch, photograph, photographic negative, blue print, plan, map, model, instrument, appliance, document, writing, or note of anything connected with the national defense; * * * shall be punished by a fine of not more than \$10,000, or by imprisonment for not more than two years, or both.

"Sec. 2. (a) Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to, or aids or induces another to, communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether rec-

ognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by imprisonment for not more than twenty years: *Provided*, That whoever shall violate the provisions of subsection (a) of this section in time of war shall be punished by death or by imprisonment for not more than thirty years; and (b) whoever, in time of war, with intent that the same shall be communicated to the enemy, shall collect, record, publish, or communicate, or attempt to elicit any information with respect to the movement, numbers, description, condition, or disposition of any of the armed forces, ships, aircraft, or war materials of the United States, or with respect to the plans or conduct, or supposed plans or conduct of any naval or military operations, or with respect to any work or measures undertaken for or connected with, or intended for the fortification or defense of any place, or any other information relating to the public defense, which might be useful to the enemy, shall be punished by death or by imprisonment for not more than thirty years.

* * * * *

"Sec. 4. If two or more persons conspire to violate the provisions of sections two or three of this title, and one or more of such persons does any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as in said sections provided in the case of the doing of the act the accomplishment of which is the object of such conspiracy. * * *

fornia. Salich,

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a naturalized, Russian-born citizen, had free access to the records as he was a civilian investigator for that office. Speaking broadly the reports detailed the coming and going on the west coast of Japanese military and civil officials as well as private citizens whose actions were deemed of possible interest to the Intelligence Office. Some statements appear as to the movements of fishing boats, suspected of espionage and as to the taking of photographs of American war vessels.

Petitioners object to the convictions principally on the grounds (1) that the prohibitions of the act are limited to obtaining and delivering information concerning the specifically described places and things set out in the act, such as a vessel, aircraft, fort, signal station, code or signal book; and (2) that an interpretation which put within the statute the furnishing of any other information connected with or relating to the national defense than that concerning these specifically described places and things would make the act unconstitutional as violative of due process because of indefiniteness.

The philosophy behind the insistence that the prohibitions of sections 1(b) and 2(a), upon which the indictment is based, are limited to the places and things which are specifically set out in section 1(a) relies upon the traditional freedom of discussion of matters connected with national defense which is permitted in this country. It would require, urge petitioners, the clearest sort of declaration by the Congress to bring under the statute the obtaining and delivering to a foreign government for its advantage of reports generally published and available which deal with food production, the advances of civil aeronautics, reserves of raw materials or other similar matters not directly connected with and yet of the greatest importance to national defense. The possibility of such an interpretation of the terms "connected with"

or "relating to" national defense is to be avoided by construing

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the act so as "to make it a crime only to obtain information as to places and things specifically listed in section 1 as connected with or related to the national defense." Petitioners argue that the statute should not be construed so as to leave to a jury to determine whether an innocuous report on a crop yield is "connected" with the national defense.

Petitioners rely upon the legislative history to support this position.² The passage of the Espionage Act³ during the World War year of 1917 attracted the close scrutiny of Congress and resulted in different bills in the two Houses which were reconciled only after a second conference report. Nothing more definite appears in this history as to the Congressional intention in regard to limiting the act's prohibitions upon which this indictment depends to the places and things in section 1(a), than that a House definition of "national defense" which gave it a broad meaning was stricken out⁴ and the conference report stated as to the final form of the present act: "Section 1 sets out the places connected with the national defense to which the prohibitions of the section apply." Neither change seems significant on this inquiry. The House bill had not specified the places under surveillance. The Conference change made them definite. The fact that the clause "or other place connected with the national defense" is also included in section 1(a) is

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not an unusual manner of protecting enactments against inadvertent omissions. With this specific designation of prohibited places, the broad definition of section 1202 of the House was stricken as no longer apt and, as stated in Conference Report No. 69, section 6 of the act was therefore adopted. Obviously the purpose was to give flexibility to the designated places.⁵ We see nothing in this

² H.R. 201, 65th Cong., 1st Sess.; Conference Report No. 69, 55 Cong.Rec. 3301.

³ Other titles such as neutrality, foreign commerce and at one time censorship, 55 Cong.Rec. 2097, 2102; 2109-2111; 2262; 2265; 3145; 3259; 3266, added to the difficulties.

⁴ That definition read: "Section 1202.

The term 'national defense' as used herein shall include any person, place, or thing in anywise having to do with the preparation for or the consideration or execution of any military or naval plans, expeditions, orders, supplies, or warfare for the advantage, defense, or security of the United States of America."

⁵ 55 Cong.Rec. 3306. Subsequent leg-

legislative history to affect our conclusion which is drawn from the meaning of the entire act.⁶

[1] An examination of the words of the statute satisfies us that the meaning of national defense in sections 1(b) and 2(a) cannot be limited to the places and things specified in section 1(a). Certainly there is no such express limitation in the later sections. Section 1(a) lays down the test of purpose and intent and then defines the crime as going upon or otherwise obtaining information as to named things and places connected with the national defense. Section 1(b) adopts the same purpose and intent of 1(a) and then defines the crime as copying, taking or picturing certain articles such as models, appliances, documents, and so forth of anything connected with the national defense. None of the articles specified in 1(b) are the same as the things specified in 1(a). Apparently the draftsmen of the act first set out the places to be protected, and included in that connotation ships and planes and then in 1(b) covered much of the contents of such places in the nature of plans and documents. Section 2(a), it will be observed, covers in much the same way the delivery of these movable articles or information to a foreign nation or its agent. If a government

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model of a new weapon were obtained or delivered there seems to be little logic in making its transfer a crime only when it is connected in some undefined way with the places catalogued under 1(a). It is our view that it is a crime to obtain or deliver, in violation of the intent and purposes specified, the things described in sections

1(b) and 2(a) without regard to their connection with the places and things of 1(a).]

[2] In each of these sections the document or other thing protected is required also to be "connected with" or "relating to" the national defense. The sections are not simple prohibitions against obtaining or delivering to foreign powers information which a jury may consider relating to national defense. If this were the language, it would need to be tested by the inquiry as to whether it had double meaning⁷ or forced anyone, at his peril, to speculate as to whether certain actions violated the statute.⁸ This Court has frequently held criminal laws deemed to violate these tests invalid. *United States v. Cohen Grocery Company*⁹, urged as a precedent by petitioners, points out that the statute there under consideration forbade no specific act,¹⁰ that it really punished acts "detrimental to the public interest when unjust and unreasonable" in a jury's view. In *Lanzetta v. New Jersey*¹¹ the statute was equally vague. "Any person not engaged in any lawful occupation, known to be a member of any gang * * *, who has been convicted at least three times of being a disorderly person or who has been convicted

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of any crime in this or in any other State, is declared to be a gangster * * *." We there said that the statute "condemns no act or omission"; that the vagueness is such as to violate due process.¹²

[3-5] But we find no uncertainty in this statute which deprives a person of the

isolation relating to the protection of national defense information is not important. The act of January 12, 1938, 52 Stat. 3, 50 U.S.C.A. § 45 et seq., is to protect against innocent disclosures. S.Rep. 108, 75th Cong., 2d Sess.

Public No. 443, 76th Cong., 3d Sess., 54 Stat. 79, is merely an increase of penalties.

⁶ Cf. *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543, 60 S.Ct. 1059, 1063, 84 L.Ed. 1345.

⁷ *United States v. Reese*, 92 U.S. 214, 23 L.Ed. 563.

⁸ *Lanzetta v. New Jersey*, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888.

⁹ 255 U.S. 81, 89, 41 S.Ct. 298, 300, 65 L.Ed. 516, 14 A.L.R. 1045.

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¹⁰ "That it is hereby made unlawful for any person willfully * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessities." Act of October 22, 1919, c. 80, § 2, 41 Stat. 297.

¹¹ 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888.

¹² Criminal statutes deemed vague: *International Harvester Co. v. Kentucky*, 234 U.S. 216, 221-224, 34 S.Ct. 853, 854-856, 58 L.Ed. 1284 (raising prices above "market value under fair competition, and under normal market conditions"); *Collins v. Kentucky*, 234 U.S. 634, 34 S.Ct. 924, 58 L.Ed. 1510 (same); *Weeds, Inc. v. United States*, 255 U.S. 109, 41 S.Ct. 306, 307, 65 L.Ed. 537 (extacting

ability to predetermine whether a contemplated action is criminal under the provisions of this law.¹³ The obvious delimiting words in the statute are those requiring "intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign

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nation." This requires those prosecuted to have acted in bad faith. The sanctions apply only when scienter is established.¹⁴ Where there is no occasion for secrecy, as with reports relating to national defense, published by authority of Congress or the military departments, there can, of course, in all likelihood be no reasonable intent to give an advantage to a foreign government. Finally, we are of the view that the use of the words "national defense" has given them, as here employed, a well understood connotation. They were used in the Defense Secrets Act of 1911.¹⁵ The traditional concept of war as a struggle between nations is not changed by the intensity of support given

to the armed forces by civilians or the extension of the combat area. National defense, the Government maintains, "is a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness." We agree that the words "national defense" in the Espionage Act carry that meaning. Whether a document or report is covered by sections 1(b) or 2(a) depends upon their relation to the national defense, as so defined, not upon their connection with places specified in section 1(a). The language employed appears sufficiently definite to apprise the public of prohibited activities and is consonant with due process.

At the conclusion of all the evidence petitioners sought a directed verdict of acquittal because (1) the innocuous character of the evidence forbade a conclusion that petitioners had intent or reason to believe that the information

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was to be used to

"excessive prices for necessities"); *Stromberg v. California*, 283 U.S. 359, 369, 51 S.Ct. 532, 535, 75 L.Ed. 1117, 73 A.L.R. 1481 (displaying any "symbol or emblem of opposition to organized government"); *Smith v. Calhoun*, 283 U.S. 553, 564, 565, 51 S.Ct. 582, 586, 75 L.Ed. 1264 (such provisions regulating common carriers as could constitutionally be applied to private carriers); *Herndon v. Lowry*, 301 U.S. 242, 261-264, 57 S.Ct. 732, 740-742, 81 L.Ed. 1066 (distribution of pamphlets intended at any time in the future to lead to forcible resistance to law).

¹³ Cf. Adequately definite criminal statutes: *State of Ohio ex rel. Lloyd v. Dollison*, 194 U.S. 445, 450, 24 S.Ct. 703, 705, 48 L.Ed. 1062 (liquor restrictions varying according to sale at "wholesale" or "retail"); *Waters-Pierce Oil Co. v. Texas* (No. 1), 212 U.S. 86, 103-111, 29 S.Ct. 220, 225-227, 53 L.Ed. 417 (contracts "reasonably calculated" or which "tend" to fix prices); *Nash v. United States*, 229 U.S. 373, 376-378, 33 S.Ct. 780, 781, 782, 57 L.Ed. 1232 (unreasonable or undue restraints of trade); *Omaechevarria v. Idaho*, 246 U.S. 343, 345, 348, 38 S.Ct. 323, 324, 325, 62 L.Ed. 763 ("any cattle range previously * * * or * * * usually occupied by any cattle grower"); *Hygrade Provision Co. v. Sherman*, 266 U.S. 497, 501-503, 45 S.Ct. 141, 142, 69 L.Ed.

402 (meat represented to be "kosher"); *Miller v. Oregon*, 273 U.S. 657, 47 S.Ct. 344, 71 L.Ed. 825 (dangerous rate of speed; see *Cline v. Frink Dairy Co.*, 274 U.S. 415, at 464, 465, 47 S.Ct. 681, 687, 71 L.Ed. 1146); *United States v. Alford*, 274 U.S. 264, 267, 47 S.Ct. 597, 598, 71 L.Ed. 1010 (building fires "near" any forest or inflammable material); *United States v. Wurzbach*, 280 U.S. 396, 399, 50 S.Ct. 167, 168, 74 L.Ed. 508 (receiving contributions for "any political purpose whatever"); *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 81, 82, 53 S.Ct. 42, 43, 77 L.Ed. 175 ("reasonable variations" in weight or measure); *Kay v. United States*, 303 U.S. 1, 8, 9, 58 S.Ct. 468, 472, 82 L.Ed. 607 ("ordinary fees * * * for services actually rendered").

¹⁴ Cf. *Hygrade Provision Co. v. Sherman*, 266 U.S. 497, 501, 45 S.Ct. 141, 142, 69 L.Ed. 402.

¹⁵ 36 Stat. 1084: "That whoever, for the purpose of obtaining information respecting the national defense, to which he is not lawfully entitled, goes upon any vessel, or enters any navy-yard, naval station, fort, battery, torpedo station, arsenal, camp, factory, building, office, or other place connected with the national defense, owned or constructed or in process of construction by the United States * * *."

the injury of the United States or the advantage of a foreign nation and (2) the evidence failed to disclose that any of the reports related to or was connected with the national defense. As a corollary to this second contention, reversal is sought on the ground that the trial court overruled the petitioners' objection that as a matter of law none of the reports dealt with national defense. That is, as the trial court stated the objection, that "the jury has no privilege in determining whether or no any of these reports have to do with the national defense, that that is a matter for the Court and not for the jury, as a matter of law."

To justify a court's refusing to permit a jury to consider a defendant's intent in obtaining and delivering these reports, one would be compelled to conclude that nothing in them could be violative of the law. As they gave a detailed picture of the counter-espionage work of the Naval Intelligence, drawn from its own files, they must be considered as dealing with activities of the military forces. A foreign government in possession of this information would be in a position to use it either for itself, in following the movements of the agents reported upon, or as a check upon this country's efficiency in ferreting out foreign espionage. It could use the reports to advise the state of the persons involved of the surveillance exercised by the United States over the movements of these foreign citizens. The reports, in short, are a part of this nation's plan for armed defense. The part relating to espionage and counter-espionage cannot be viewed as separated from the whole.

[6] Nor do we think it necessary to prove that the information obtained was to be used to the injury of the United States. The statute is explicit in phrasing the crime of espionage as an act of obtaining information relating to the national defense "to be used * * * to the advantage of any foreign nation." No distinction

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is made between friend or enemy. Unhappily the status of a foreign government may change. The evil which the statute punishes is the obtaining or furnishing of this guarded information, either to our hurt or another's gain. If we accept petitioners' contention that "advantage" means advantage as against the United States, it

would be a useless addition, as no advantage could be given our competitor or opponent in that sense without injury to us.

An examination of the instructions convinces us that no injustice was done petitioners by their content. Weighed by the test previously outlined of relation to the military establishments, they are favorable to petitioners' contentions. A few excerpts will make this clear:

"You are instructed that the term 'national defense' includes all matters directly and reasonably connected with the defense of our nation against its enemies. * * *

As you will note, the statute specifically mentions the places and things connected with or comprising the first line of defense when it mentions vessels, aircraft, works of defense, fort or battery and torpedo stations. You will note, also, that the statute specifically mentions by name certain other places or things relating to what we may call the secondary line of national defense. Thus some at least of the storage of reserves of men and materials is ordinarily done at naval stations, submarine bases, coaling stations, dock yards, arsenals and camps; all of which are specifically designated in the statute. * * * You are instructed in the first place that for purposes of prosecution under these statutes, the information, documents, plans, maps, etc., connected with these places or things must directly relate to the efficiency and effectiveness of the operation of said places or things as instruments for defending our nation. * * * You are instructed that in the second place the information, documents or notes must relate to those angles

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or phases of the instrumentality, place or thing which relates to the defense of our nation; thus if a place or thing has one use in peacetime and another use in wartime, you are to distinguish between information relating to the one or the other use. * * *

"The information, document or note might also relate to the possession of such information by another nation and as such might also come within the possible scope of this statute. * * * For from the standpoint of military or naval strategy it might not only be dangerous to us for a foreign power to know our weaknesses and our limitations, but it might also be danger-

ous to us when such a foreign power knows that we know that they know of our limitations.

"You are, then, to remember that the information, documents or notes, which are alleged to have been connected with the national defense, may relate or pertain to the usefulness, efficiency or availability of any of the above places, instrumentalities or things for the defense of the United States of America. The connection must not be a strained one nor an arbitrary one. The relationship must be reasonable and direct."

Petitioners' objection, however, is that after having given these instructions, the court instead of determining whether the reports were or were not connected with national defense, left this question to the jury in these words:

"Whether or not the information, obtained by any defendant in this case, concerned, regarded or was connected with the national defense is a question of fact solely for the determination of this jury, under these instructions."

[7-10] These quotations show that the trial court undertook to give to the jury the tests by which they were to determine whether the acts of the petitioners were connected with or related to the national defense. We are

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of the opinion this was properly left to the jury. If we assume, as we must here after our earlier discussion as to the definiteness of the statute, that the words of the statute are sufficiently specific to advise the ordinary man of its scope, we think it follows that the words of the instructions give adequate definition to "con-

nected with" or "relating to" national defense. The inquiry directed at the instructions is whether the jury is given sufficient guidance to enable it to determine whether the acts of the petitioners were within the prohibitions. These instructions set out the definition of national defense in a manner favorable and unobjectionable to petitioners. When they refer to facts connected with or related to defense, however, petitioners urge that the connection should be determined by the court. Instructions can, of course, go no farther than to say the connection must be reasonable, direct and natural. Further elaboration would not clarify. The function of the court is to instruct as to the kind of information which is violative of the statute and of the jury to decide whether the information secured is of the defined kind. It is not the function of the court, where reasonable men may differ, to determine whether the acts do or do not come within the ambit of the statute. The question of the connection of the information with national defense is a question of fact to be determined by the jury as negligence upon undisputed facts is determined.¹⁶

In a trial under an indictment for violation of section 3¹⁷ of this same Espionage Act, this Court had occasion to consider

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a similar question as to the function of the jury. A pamphlet was introduced as evidence of making false statements with the intent to cause insubordination. To the objection that the pamphlet could not legitimately be construed as tending to produce the prohibited consequences this Court said: "What interpretation ought to be placed upon the pamphlet, what would be the probable effect of distributing it in

¹⁶ Grand Trunk Ry. v. Ives, 144 U.S. 408, 417, 12 S.Ct. 679, 682, 36 L.Ed. 485; Gunning v. Cooley, 281 U.S. 90, 94, 50 S.Ct. 231, 233, 74 L.Ed. 720. Cf. Dunlop v. United States, 165 U.S. 486, 500, 501, 17 S.Ct. 375, 380, 41 L.Ed. 799.
¹⁷ 40 Stat. 217, 219, c. 30, 50 U.S.C.A.

§ 33:

"Sec. 3. Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to pro-

mote the success of its enemies and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than \$10,000 or imprisonment for not more than twenty years, or both."

the mode adopted, and what were defendants' motives in doing this, were questions for the jury, not the court, to decide.

* * * Whether the printed words would in fact produce as a proximate result a material interference with the recruiting or enlistment service, or the operation or success of the forces of the United States, was a question for the jury to decide in view of all the circumstances of the time and considering the place and manner of distribution."¹⁸

Viewing the instructions as a whole, we find no objection sufficient to justify reversal.

The Circuit Court of Appeals properly refused to consider the errors alleged with respect to the conspiracy count.¹⁹

Affirmed.

Mr. Justice MURPHY took no part in the consideration or decision of this case.

¹⁸ *Pierce v. United States*, 252 U.S. 239, 250, 40 S.Ct. 205, 209, 64 L.Ed. 542. Justices Brandeis and Holmes dissented, largely on the ground that the jury should not be left to decide whether statements in the pamphlet were facts

or conclusions. *Id.*, 252 U.S. page 269, 40 S.Ct. page 216, 64 L.Ed. 542.

¹⁹ *Brooks v. United States*, 267 U.S. 432, 441, 45 S.Ct. 345, 347, 69 L.Ed. 699, 37 A.L.R. 1407.

UNITED STATES v. HEINE.

No. 17.

Circuit Court of Appeals, Second Circuit.

Nov. 8, 1945.

Before L. HAND, CHASE, and
FRANK, Circuit Judges.

L. HAND, Circuit Judge.

Heine was indicted with thirty-two other defendants, under an indictment in two counts. The first count (under § 88 of Title 18, U.S.C.A.), was for a conspiracy to violate § 233 of Title 22, U.S.C.A.: which makes it a crime not to register with the Secretary of State, if one is acting as an agent for a foreign government. The second count under § 34 of Title 50, U.S.C.A., was for a conspiracy to violate § 32 of that title, the relevant language of which is set forth in the margin.* The most important point raised upon this appeal, and the only one which we find it necessary to discuss, is the sufficiency of the evidence to sustain a verdict. We will consider the two counts in inverse order, for the second is much the more important; especially as the defendant has already served the term for which he was sentenced under the first.

Heine was a native-born German, fifty

years old at the time of the trial (November and December, 1941), who came to this country in June, 1914. Although he had had some business experience, his first job in the United States was as a mechanic in the Packard Motorcar Company in Detroit, where he lived with his brother. In January, 1918, he went into the employ of the Ford Motor Company, and was sent to the West Indies in 1919. Upon his return in 1920, the company sent him to South America, where he worked in Brazil, Argentine, Uruguay and other countries. He was naturalized in 1920, was married in January, 1922; and in August, 1922, returned to this country. Later he went to England, and after that to Italy, the Balkans, and Barcelona. He came back again to this country in 1925; but on January 1, 1926, he was sent to Berlin as assistant manager of the Ford assembly plant, and in August, 1928, he became a manager of the business. Late in 1930 or early in 1931, he went to Cologne to superintend a new manufacturing plant which had been built there. In 1935 he returned to Detroit, and in May of that year he left the Ford Company for good, and took a position with the Chrysler Corporation, for which he worked in Spain, Portugal and North Africa.

In 1938 and 1939 a German automobile corporation, known as the Volkswagenwerke, suggested that a position might be open to him; but this he was unwilling, however, to consider, because, as he swore, the American consul at Munich told him that he must go home, if he wished to keep his citizenship. Whatever the reason, he did return to the United States in May, 1940, with authority from the Volkswagenwerke to recover some deposits paid to local companies which they had received upon contracts that the companies had abandoned. The Volkswagenwerke also asked him to find out what he could about the automobile and aviation industries in this country. A few weeks after his return he began to send back reports about the aviation industry which constitute the

* "§ 32. Unlawfully disclosing information affecting national defense. Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to, or aids or induces another to, communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recog-

nized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by imprisonment for not more than twenty years."

gravamen of the charge against him. These he continued to send until August, 1940, and perhaps later, though not after December 7, 1941. At the direction of the Volkswagenwerke he did not send these direct, but posted them to addresses in New York and Lima, Peru, from which they were to be forwarded to Germany. The evidence permitted the jury to find that this course was surreptitiously adopted in order to escape detection.

The information which Heine collected was from various sources: ordinary magazines, books and newspapers; technical catalogues, handbooks and journals; correspondence with airplane manufacturers; consultation with one, Aldrich, who was already familiar with the industry; talks with one or two employees in airplane factories; exhibits, and talks with attendants, at the World's Fair in New York in the summer of 1940. This material he condensed and arranged in his reports, so as to disclose in compressed form the kinds and numbers of the planes—military and commercial—which were being produced and which it was proposed to produce; the location and capacity of the factories; the number of their employees; and everything else, of which he could get hold, that would contribute to as full a conspectus as possible of the airplane industry. All of this information came from sources that were lawfully accessible to anyone who was willing to take the pains to find, sift and collate it; no public authorities, naval, military or other, had ordered, or indeed suggested, that the manufacturers of airplanes—even including those made for the services—should withhold any facts which they were personally willing to give out. The question which the second count raises is whether § 32 of Title 50, U.S.C.A. covers such activities as we have described.

[1] The evidence as a whole supported a finding that Heine was engaged in collecting all available information about our production of airplanes, so that the Reich should be advised of our defense in the event of war. That would not however serve, unless § 32 would have equally condemned what he did, if he had sent his reports to a friendly power in a time of unthreatened peace. This follows from the fact that the section covers, not only information intended to be used "to the injury of the United States," but that intended to be used "to the advantage of a foreign

nation." When the bill left the House it did not have the second clause; and it does not appear at what stage it was amended by adding the alternative, which greatly enlarged its scope; for while it is true that it is somewhat hard to imagine instances in which anyone would be likely to transmit information "relating to the national defense," which would be injurious to the United States, and yet not advantageous to a foreign power, it is possible to think of many cases where information might be advantageous to another power, and yet not injurious to the United States. The section as enacted necessarily implies that there are some kinds of information "relating to the national defense" which must not be given to a friendly power, not even to an ally, no matter how innocent, or even commendable, the purpose of the sender may be. Obviously, so drastic a repression of the free exchange of information it is wise carefully to scrutinize, lest extravagant and absurd consequences result.

It seems plain that the section cannot cover information about all those activities which become tributary to "the national defense" in time of war; for in modern war there are none which do not. The amount of iron smelted, of steel forged, of parts fabricated; the number of arable acres, their average yield; engineering schools, scientific schools, medical schools, their staffs, their students, their curriculums, their laboratories; metal deposits; technical publications of all kinds; such non-technical publications as disclose the pacific or belligerent temper of the people, or their discontent with the government; every part in short of the national economy and everything tending to disclose the national mind are important in time of war, and will then "relate to the national defense". If the words mean that, it would be criminal to send to a subject of Britain or to a citizen of France a railway map, a list of merchant ships, a description of automobile assembly technique, an account of the latest discoveries in antisepsis, or in plant or animal breeding, or even a work upon modern physics, provided only the sender had reason to believe that the information might reach the government, and be helpful to it in any of its activities. Nor would this become tolerable, though we limited the phrase to what would be advantageous to those countries in their own national defense, because that is as all-embracing as

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our own. Such an assertion of national isolationism is certainly not to be imputed to Congress.

[2,3] A less impossible interpretation would be to confine the clause to information about things adapted only for the national defense, and things of ambiguous use which have been already collected, or prepared, for the supply of the armed services. The first would include airplanes, cannon, small arms and munitions of war, warships, forts, and the like; the second, coal, food, clothing or other supplies accumulated for the army and navy. In that interpretation the clause would cover those military planes, though made by private companies, which Heine's reports included. Even so, there might be doubt whether the judge's charge to the jury should not have distinguished between military and commercial planes; but we need not consider that question because we think that it was lawful for him to include information about both kinds of planes. As declared in *Gorin v. United States*, 312 U.S. 19, 28, 61 S.Ct. 429, 85 L.Ed. 488, and as the judge himself charged, it is obviously lawful to transmit any information about weapons and munitions of war which the services had themselves made public; and if that be true, we can see no warrant for making a distinction between such information, and information which the services have never thought it necessary to withhold at all. There can, for example, be no rational difference between information about a factory which is turning out bombers, and to which the army allows access to all comers, and information about the same bombers, contained in an official report, or procured by a magazine through interviews with officers. The services must be trusted to determine what information may be broadcast without prejudice to the "national defense," and their consent to its dissemination is as much evidenced by what they do not seek to suppress, as by what they utter. Certainly it cannot be unlawful to spread such information within the United States; and, if so, it would be to the last degree fatuous to forbid its transmission to the citizens of a friendly foreign power. "Information relating to the national defense," whatever else it means, cannot therefore include that kind of information, and so far as Heine's reports contained it, they were not within the section.

[4-6] There is independently reason to suppose that this was the meaning which

the House at least had in mind when the bill was before it during the First War--1917. It is true that the debates on the floor of both Houses do not tell much, but at the hearings before the Judiciary Committee a number of the witnesses expressed concern at the possible suppression of information as the bill read even before its scope had been enlarged by the amendment. Possibly it was to allay these fears that the Committee, in reporting to the House, used the following words in connection with § 4 as it then was: "This section of the bill has been carefully and patiently considered by the Committee. The Committee realizes that the section as recommended gives the President broad power, but it must be admitted by all patriotic persons anxious for the success of our armies in times like these through which we are now going, it is important that the Commander-in-Chief shall have authority to prevent the publication of national defense secrets which would be useful to the enemy, and, therefore, harmful to the United States." Section 4, about which this language was used, gave the President power to declare a national emergency, and to "prohibit the publication or communication of * * * any information relating to the national defense which in his judgment is of such a character that it is, or might be, useful to the enemy." It is most unlikely that the words in § 4 had a meaning different from the same words then in § 2 of the bill, and now in § 32 of Title 50. At least the Judiciary Committee of the House supposed that the act was directed at "secrets." It is not necessary for us to go so far; and in any event "secrets" is an equivocal word whose definition might prove treacherous. It is enough in the case at bar to hold, as we do, that whatever it was lawful to broadcast throughout the country it was lawful to send abroad; and that it was lawful to prepare and publish domestically all that Heine put in his reports. We do not forget that there was evidence that in his letters and in his talks he misled his correspondents as to his motive in asking for information; but that is not relevant to the second count. Whatever the wrong done to his correspondents, that motive did not make the spread of information criminal, which it would not have been criminal to spread, if he had got it fairly. Nor did it make a difference that Heine did not transmit to the Volkswagenwerke the information as he got it;

But if they had stamped "Secret!"

pure overbreadth

but combed it out, arranged it and compressed it into convenient form. The section is aimed at the substance of the proscribed information, not at the act of making it more readily available for use.

Gorin v. United States, supra (312 U.S. 19, 61 S.Ct. 429, 85 L.Ed. 488), contains nothing to the contrary of what we are holding. It is true that the court (312 U.S. 28, 61 S.Ct. 434) there accepted the following definition of the phrase, "relating to the national defense" taken from the prosecution's brief: "a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness." The words, "related activities of national preparedness," do indeed create a penumbra of some uncertainty; but it cannot comprise such information as is here in question, as appears from what immediately preceded the language we have quoted: "Where there is no occasion for secrecy, as with reports relating to national defense, published by authority of Congress or the military departments, there can, of course, in all likelihood be no reasonable intent to give an advantage to a foreign government." Obviously, this could not mean that it may not be to the advantage of a foreign government to have possession of such information; it can only mean that, when the information has once been made public, and has thus become available in one way or another to any foreign government, the "advantage" intended by the section cannot reside in facilitating its use by condensing and arranging it.

[7] As to the first count, in spite of the absence of any direct evidence showing the connection of the Volkswagenwerke with the Reich, there was ample in Heine's history and conduct to support a verdict based upon the finding that he was acting as an agent for the Reich, and the jury was of course not bound to accept his own explanation. The Volkswagenwerke had never made airplanes; and, so far as appears, they did not propose to make military planes anyway. Why should they wish accounts of the industry in this country as complete as possible? What good would it do them to learn the amount of our production, all of which at the time was for our own use? Moreover, although it is true that in the summer of 1940, war was not imminent, everyone knew that it

was not impossible. France had fallen; Russia was apparently neutral, and had overrun part of Poland in conjunction with Germany; Britain stood alone, with every prospect of herself going down. We were already embarked upon our belated preparation, and that could be directed only against the Reich. If a jury was not permitted in such a setting to infer that the collection and transmission of such information by such means as Heine employed, was for the Reich, and not for the Volkswagenwerke, there is an end to circumstantial proof. Nobody but a simpleton could fail to detect the hall-marks of the principal in whose interest the whole web of chicane and evasion had been woven.

Conviction on the first count affirmed.

Conviction on the second count reversed.

NOTES AND QUESTIONS

A reading of the indictments, statutes, and cases should suggest a number of problems.

I. What is meant in count one of the second indictment by the charge of conspiring to defraud the United States by impairing its lawful governmental function of controlling the dissemination of classified governmental studies? Look at the first sentence of section 371 (page 452 of the casebook). If the first clause includes any offense against the United States, what is the second clause on fraud intended to cover? To what extent does that expand the scope of acts covered by the statute?